

Law on the Left: a Conversation with Duncan Kennedy

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Did you grow up in a political family?

I was born in 1942. I come from an upper-middle class, but not wealthy, family described by my mother as ‘impoverished gentry’. My father was an architect—not a firm architect; he was in business for himself—and my mother worked in a publishing house as a reader. That was her day job; she was also a poet and a painter. They were both cultivated Stevenson Democrats,¹ both young and in their twenties during the New Deal and strongly committed to the idea of an anti-Communist model of progressive politics with a strong sense that class and poverty and race were the fundamental political issues.

My political experiences began with these Stevenson-style Democratic commitments at home. I went to a progressive elementary school in Cambridge, Massachusetts and my first moments of political rebellion were rebellions against the various authoritarian undercurrents of this ultra-progressive participatory environment. This is important, as my whole political life has been much more organised against liberalism than against conservatism. I still see mainstream American liberalism, even in its decline, as only sporadically a positive political force and more often as deeply problematic.

You also went to high school in Cambridge?

No. In 1957, my parents sent me to Phillips Academy, Andover. I was a scholarship kid and I was also a nerd. To have a scholarship had important radicalising potential in the world of 1950s America. There was a real difference between the kids whose parents could afford an elite education and the kids whose parents could not afford it, but got in anyway. Scholarships were based on merit (so called) so there was a tension created *inside* elite institutions. We nerd-like scholarship kids who made it on the basis of our brains were embedded in a universe that had very different values: swagger, macho, money and sports were the fundamental values of the American upper-middle class and our nerd-scholarship identity was polarised against that.

Hazing had a big role in the training of American upper middle class elites of the 1950s. Phillips Academy was a boarding school and boarding schools produce *Lord of the Flies*-type universes that are, for some people, radicalising. All through the 1950s there was a subset of people who reacted against them, forming their own proto-

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political alliances. They were not specifically political, but it was a hazing universe with physical brutality, deeply homophobic, culturally reactionary and, in so much as this was political, so too were the alliances that formed in opposition.

*Was there any concrete content to this political identity or was it merely an identity of opposition?*²

My friends in Andover were into literature and the arts, which represented rebellion against the milieu, and it was implicitly liberal. I was more interested in politics than most of my friends, and I called myself a socialist. That was a provocative posture, an adolescent gesture much like calling oneself a Martian or painting one's hair blue. I had not read Marx, but a teacher in my progressive elementary school had given me several of Paul Sweezy's pamphlets. Sweezy was a Marxist, an economics professor at Harvard who wrote an incredible book about Marxist economics but was denied tenure.² He represented a non-Communist, radical leftism advocating socialism premised on state ownership of the means of production to achieve class justice as well as rational growth.

Being a scholarship student had its own complex political dimension. Scholarship students had regular jobs—a few hours of work a week. In my first year I was assigned to take prospective students and their parents around on little introductory tours. Somebody's mother asked me if the kids were nice to each other. I hesitated and then said, sheepishly as I remember, that there was some hazing. The next day I was reassigned to a job in the dining hall.

The dishes were washed by giant machines in a kind of washing-rinsing-drying assembly line. All students had to spend, if I remember correctly, one week a year on that duty. The scholarship kids were there full time, but we also had more responsible jobs. It was hot and dirty and unpleasant. It was great to get promoted the next year into the very responsible job of checking in my fellow students at the dining hall for compulsory breakfast. This involved getting up and over there before anyone else was awake, and contemptuously rejecting the whining requests to be pardoned demerits for being late. Then I was put one step higher, to be the morning checker for the freshman dining hall and also a proctor, having to eat with the freshman students and supposedly intervene when they tried to use their knives as catapults to toss pats of butter to the 20-foot ceiling. I'm pretty sure that George Bush the younger was one of my obnoxious charges.

By the time we were seniors, we scholarship kids were like 'trustees' in prison, ambivalently part of and not part of the system, failing at the athletic challenges and macho swagger competitions that defined prestige; closer to the adults but contemptuous of them too.

Of course, we also understood that we were going to get out of this an enormous reward: that we would get into good colleges, with more scholarships, and have vastly more choices in life than if we had gone to any but the handful of high-status public schools (which were no less expensive than Andover because of the property taxes that paid for them). Many of the frat-boy jocks would go to less-good colleges that are part

² PAUL SWEETZ, *THE THEORY OF CAPITALIST DEVELOPMENT* (1946).

of the reproduction of the real estate and finance sectors of the economy. They could go to colleges that were lower ranked than the Ivy League colleges, or they went to Brown or Dartmouth, as opposed to Harvard, Yale, Chicago, Columbia or Stanford. We were being tracked, so the reward of the scholarship labour was large, and we understood it to be large.

Looking back on it, I think there were some of us, not many but some, who developed a complicated set of attitudes that shaped life for ever after. This was our complicated relationship with the upper-middle class elite which combined elements of intellectual superiority and financial inferiority: a complex experience of identification with the adults rather than with our peers, but the sense that the adults presided innocently or malevolently over a nasty regime.

You then went to Harvard where you studied economics.

Yes, after I graduated from Andover, I was admitted to Harvard College, again with a scholarship. I was accepted with advanced standing which meant I could start as a sophomore and so I took a year between Andover and starting college and went to Paris.

In Paris I did not have any money—my parents weren't able to support me—so I needed to find a way to support myself. I ended up, through a family connection, as an intern at the Morgan Guaranty Trust office, which paid just enough to survive in paradise. This was in the Place Vendôme, at the heart of Paris. The office faced the Ritz, with a grand column, built on Napoleon's orders, in the centre of the square. I could speak both French and English, so for eight hours each day I changed traveller's cheques for tourists, many of whom were staying at the Ritz. This was an amazing experience of the ruling class of the moment. And then I would eat lunch every day in the canteen where the lower-middle class French woman clerical workers ate. This was no less exotic. I was just a fly on the wall; they didn't even know I was there and they would talk about their lives.

You were in Paris at a particularly tumultuous time in French politics. Were your own politics shaped at all by that?

Yes, this was the middle of the Algerian war and French politics was just overwhelmed with violence. The FLN³ was present in Paris and there would be the occasional terrorist attack. And there was a fascist General's coup against de Gaulle. I was reading French newspapers, mainly *Le Monde* and *L'Express*, but including *L'Humanité*,⁴ so I was really immersed in this world. Most of the young French kids I met and hung out with supported the war, and only switched the next year when de Gaulle pulled the plug on it. But I was against it and lapped up the utterly unfamiliar, to an American, radical lefty literature that was everywhere at the time. I righteously denounced the Bay of Pigs invasion as no better than what the French were doing.

³ Front de Libération Nationale.

⁴ Then the daily newspaper of the French Communist Party.

It left its mark on me: when I went back to the US I had a strong interest in African independence and the post-colonial French- and English-African universe. I started at Harvard where I majored in economics. The idea was that if you were interested in social justice, you had to be an economist. In my first Harvard summer, I got a room-and-board internship in Guinea in a French-American joint venture bauxite mine.

The European staff, all French, were mainly nasty neo-colonialists who deeply regretted the loss of their Empire and were openly racist among themselves about the Guineans. The two exceptions were both Mendès France-style socialists. The Guinean regime of Sékou Touré was the first leftist French post-colonial regime in Africa. When de Gaulle created the new French Community—the equivalent of the Commonwealth—they rebelled as leftists and were the only French colony to refuse membership. But Sékou Touré's regime, if left-wing, was authoritarian, basically a dictatorial, totalitarian regime moving toward a police state. My basic experience in Guinea was realising that the left could be as horrible as the right.

I wrote my undergraduate thesis—the title was 'Economic Dominance in the Colonial Relation: A case study of Nigeria'—as an attempt to develop a left-wing economic analysis of colonialism. But not a Marxist analysis: it did not use Marxist exploitation theory or the labour theory of value but rather was situated within the general context of neo-classical economics. At least that was the idea. It was not successful, but it was a serious attempt to do a piece of left-economic analysis as a child.

When you graduated in 1964, were you already interested in law?

Yes, in fact my economics tutor was a law student. My thesis tried hard to say something about law as 'rules of the game', weirdly similar to what I was going to make my hobbyhorse in later decades, but law defeated all of our outsider attempts. So law school very much on the radar. But by this time I had been converted to Cold War left-liberalism, a product of my economics training, my exposure to Sékou Touré, and my basic background anti-Communism, which came from reading anti-Soviet literature—Koestler's *Darkness at Noon*, *The God that Failed*—very powerful anti-Soviet literature.⁵ Law school was on my radar as part of a career trajectory in government. The basic idea was that liberal, Democratic administrations hire people from law firms, so you work as a lawyer, then in government, and then when the administration changes, you go back to the law firm and you circulate back and forth.

But you did not go straight to law school. Instead you were recruited by the Central Intelligence Agency.

In 1964, when I graduated, the draft ramped up and took everybody to go to Vietnam or Western Europe. We were still garrisoning a large part of Western Europe and there was a massive military presence populated by draftees. In the spring of 1964, after the Tonkin Gulf incident, Johnson sent the first 150 thousand troops to Vietnam. At the time, I had accepted a job as a staffer on an American team of development

⁵ ARTHUR KOESTLER, *DARKNESS AT NOON* (1941); *THE GOD THAT FAILED* (Richard Crossman ed., 1949).

economists going to Liberia to advise the government on growth. Then I got sick, probably a result of going on a student-delegation trip to Southeast Asia and eating imprudently. I recovered, got married, and accepted a job with USAID in Chile, but then the marriage exemption from the draft was ended.

I really did not want to go to Vietnam, really, really did not want to go. My father said to me: 'How do you feel about this if it's a basic experience of your generation, don't you want to be part of it?' To which I said, 'Dad, no I don't. This is really bad shit. I totally disagree with the war and also I really don't want to die.' We already knew that second lieutenants had the highest casualty rate in Vietnam, and we were the second lieutenants: college graduates became the low-level commissioned officers. So we were all scrambling to get out of the draft in various ways. The CIA recruited me with the offer that I would get out of the draft.

The CIA was funding various front organisations designed to promote Western culture and politics against the Soviets. It was based on the idea that we were a liberal pluralist society, the opposite of the totalitarian Soviet Union, and this could be seen by the existence of secondary organisations and all kinds of independent pluralist groups. In fact the pluralism was being financed by the CIA. *Encounter* magazine was an example of this. It published people like Claude Lévi-Strauss and Steven Spender and was an anti-Communist left-intellectual magazine financed by the CIA.⁶

I had been recruited two years before as a college junior into the part of this network that did international student politics, as a low level collaborator, but had no intention of pursuing it as a career. That's where I ended up working when the deferments ran out. The people who ran this unit were left-liberal cold warriors, as was I, and the culture money subsidised a moderately left student organisation to be a player in a kind of odd, big-time model United Nations composed of student organisations from just about every country in the world.

I found the covert universe fascinating and attractive; it was hallucinogenic. I was deeply into conspiracy: I believed, as I still do, that there are always layers and layers behind whatever is going on. But it also made me nervous. Kennedy had been shot and Johnson really looked bad to me. Stevenson liberals thought Kennedy was a pig and Kennedy liberals thought Johnson was a pig. In fact, Johnson was infinitely more left-wing than Kennedy would ever have been. If you read Robert Caro's biography⁷ you can see that it was amazing what he was doing, but we thought it was much too little and much too late. And he was accelerating the war.

Nonetheless, I was an anti-communist, I believed that the secret world should be understood not denied, I didn't think I'd be asked to do anything even a little bad, and, of course, there was the draft.

What specifically were you doing for the CIA?

I spent two years at the CIA. The first I spent in the field, an agent of student politics, traveling all over the world. I was the overseas representative of the National

⁶ Spender, along with Irving Kristol, founded the literary magazine in 1953.

⁷ ROBERT CARO, *THE YEARS OF LYNDON JOHNSON* (1982, 1990, 2002, 2012).

Student Association. We organised conferences, produced manifestos, in alliance with the Western European student unions, and aided and cooperated with student organisations from developing countries in an effort to build a Western-oriented politics of a moderately left variety. The US organisation criticised the US government a lot, to establish credibility but also because the leaders believed the criticism. We also gathered information that went back to Washington about student politics, which was a side effect for some but maybe the main justification for others.

The second year I spent inside the Langley headquarters, working for the internal staff that supervised the front organisations, collating the intelligence they gathered, and so forth. The operation was exposed at the end of my second year working for the CIA. Not everyone in the front organisation was a CIA agent. It was divided between the witting and the unwitting, and that is how the cover was eventually blown: the boundary turned out to be somewhat porous, especially when more and more of us liberal cold warriors were deciding that we, the US government, were no longer the good guys, or even good at all.

I started out thinking the CIA was a good way to get out of the draft, which made me a lot less of a true believer than most of my colleagues. But by the end of my experience there, I had started to be radicalised. It was all about the war, but as the war came to seem an atrocity, many other long-term bad aspects of our foreign policy began to look like part of the pattern rather than like aberrations.

In 1967, having left the CIA, you started your legal studies at Yale Law School. Did your radicalisation continue?

In the first year of law school, this was 1967-68, I had the classic generational experience of radicalisation. I started law school as a disillusioned Cold War left-liberal, anti-Communist, and then there was this realisation: the Soviet Union was a paper tiger; with the Prague Spring in 1968, it was obvious that the Soviet Union under Brezhnev had had it; I was happy not sad or alarmed by the successes of the North Vietnamese Tet offensive. The whole anti-Communist construct was now nothing but an aspect of conservatism in America, and the liberal commitment to anti-Communism was a major source of America's inability to deal with the real problems, the war and the ghetto. In the course of a year I switched back to a position much more like that of my teenage self and have been there more or less ever since.

Did Yale have a reputation as a liberal law school?

Yes, it did. Once I got into early admission at Yale I didn't apply to Harvard, because it seemed clear that it was conservative and Yale was liberal. There were a few conservative professors at Yale, but it was a headquarters of the best and the brightest liberals, the people who were then the Kennedy and Johnson 'brain trust'; many academics in the Democrat administrations were on the Yale Law School faculty.

Yale was the training ground for a career in the liberal political class, the career that I was anticipating when I applied. You go to Yale Law School, you work for a corporate law firm when you are not serving in some form of public service. And then,

after a while, you are established, so even when you are working in the law firm there are many liberal political activities that partners in Wall Street law firms perform. Or alternatively you might stay on permanently in Washington as a senior career civil servant.

In the late 60s, this identity was disintegrating for my generation, especially at a place like the Yale Law School. The liberal rulers were discredited politically by the war and their failure to react strongly enough to black rebellion and the civil rights movement.

They were also discredited culturally: it seemed indisputable that a generational baby boomer revolution was under way—not just hippies and the summer of love and SDS, but something cultural and profound and liberatory. It seemed (falsely) like there was no going back and, as Dylan put it, ‘something is happening, Mr Jones, something is happening and you don’t know what it is’. The older liberals were progressive politically but their cultural style, with a very few exceptions, was straight, conservative and closed.

These two things produced a joint reaction in the Yale Law School from the younger generation. When I started at Yale, basically everyone was a liberal very much like myself, but by the time we graduated, half the class would say they were radicals or counter-culturalists. We were reading black radicals—the autobiography of Malcolm X,⁸ Black Panthers literature like *Soul on Ice*⁹—and many liberals were sitting in the dining hall and saying things like ‘if I was a black guy, I’d take up the gun’. Absurd.

Laura Kalman has written a book about the Yale Law School in the 1960s, which describes this period very accurately.¹⁰ I also wrote a piece in the 1990s about this moment.¹¹ It emerged from a couple talks I gave to students involved in labour actions at Yale. Their problem was that all these liberal humanities professors were just busting the unions: that’s all they wanted to do, and they were just brutal about it. They all identified as leftists, and they never would have voted for anyone but a Democrat, but their basic politics was consistent with giving bad recommendations to any student who was involved with union organising. It was a very similar attitude to what eventually emerged at the law school in the late 60s and early 70s.

When did you decide to pursue a career in legal academia?

By the time I finished law school I was pretty thoroughly radicalised. The anti-war movement was going strong, there were riots in the ghettos, and every summer cities were burning. Second wave feminism was taking off. Already by my third year at Yale, I realised that the government/corporate practice option, which I had been oriented to in one way or another since 1964, was not for me.

In my first summer in law school, I had worked for Mayor Lindsay in New York.¹² Lindsay was a Republican, but he was really very liberal. I worked in the Bureau of the

⁸ MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

⁹ ELDRIDGE CLEAVER, *SOUL ON ICE* (1968).

¹⁰ LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* (2005).

¹¹ Duncan Kennedy, *Boola!*, 49 *SOCIAL TEXT* 31 (1996).

¹² John Lindsay was mayor of New York from 1966 to 1973.

Budget of the City of New York on schools issues: the United Federation of Teachers, the teachers union, was resisting every form of integration and decentralisation, and that was a big battle. Then, in my second summer, I worked for Debevoise, Plimpton, Lions and Gates, which was a Park Avenue white shoe firm, a classic corporate law firm. The firm was like a Woody Allen-type experience in which I was impersonating an up-and-coming Wall Street lawyer with complete reservations by now—extreme psychic reservations—about every aspect of the experience. So, in my third year, I decided quite abruptly to become a law professor.

There were many students positioned similarly, people for whom the liberal government/corporate world was discredited. The people who eventually created Critical Legal Studies all shared some aspect of this disillusionment. And in spite of the conflictual experiences at the Yale Law School, the professors were in many ways great role models. They were intellectually and politically serious. And there were younger members of the faculty who engaged with us—people like John Griffiths, David Trubek, Rick Abel—who represented the possibility of being an elite law prof without the political and cultural baggage of the older liberals. I realised at the time that I had felt much freer and more productive at Harvard College and Yale Law School than I ever had in my masquerading lives at the Morgan Guaranty Trust, the Guinean multinational, the CIA, or Debevoise Plimpton.

The bad aspects of the milieu seemed like something worth fighting against and not a lost cause. These admirably intellectual and politically sophisticated professors became reactionary when they came under attack by ungrateful student masses, particularly scary newly arrived black radicals. For example, there was a serious proposal to have a loyalty oath: to be a Yale law student one would have to make an oath of loyalty to the principles of academic freedom and civility inside the institution. The faculty never actually did implement it but it was seriously contemplated as a way to deal with sit-ins, disruptions, and so on.

Did your radicalism take an intellectual shape at law school or would the radical critique of law come only later?

We were a small cohort in 1970 at the Yale Law School, about five or six of us who eventually went into legal education and who were the intellectual participants in the student protest movement. Mark Tushnet was very important, a post-Marxist—he ended up at the University of Wisconsin-Madison. And Rand Rosenblatt, another post-Marxist, went to Rutgers-Camden. He was married to Ann Freedman, a radical who was also a serious feminist and also went to Rutgers-Camden.

We were different from the liberals, most of whom went into law practice, and, if they didn't become thoroughly corporate, became civil rights lawyers and plaintiff-side anti-discrimination lawyers, labour-side labour-lawyers, progressive civil servants, lawyers for NGOs of all kinds. They were much more practice-oriented. They had a generational and political agenda, but they were only somewhat interested in either legal theory or social theory. What set us apart was our intellectual agenda, which was to bring to bear some kind of critical, theoretical take on law and legal education.

We knew there was a Marxist base-superstructure analysis, but that was all there was on the Marxist side. One option was to develop a sophisticated post-realist Marxist theory of law. The option that appealed to me, since I was not a Marxist and knew nothing about Marxism except for the wildly distorted parodies dished out at the beginning of Harvard economics classes, was quite different. It began, oddly enough when I was introduced to Legal Realism. Alexander Bickel was the leading liberal constitutional law professor in the late 1950s and through the 1960s up until 1970, when he switched and became a neo-liberal, radicalised by his reaction against black radicalism and the student movement. In the second semester of my first year, the spring of 1968—everyone is being shot, the world is just going crazy—he said to me ‘Kennedy, you know, the way you’re talking in class, I think you might be interested in Legal Realism’. Legal Realism was never mentioned in the curriculum—it simply did not exist—but Bickel was an intellectually sophisticated teacher who could say, to pique my interest, you should read Karl Llewellyn. So I did.

I absorbed legal realist anti-formalism, and the idea that law was much more the product of serious ethical dilemmas than appeared in the classroom. But the most striking thing was the realisation that post-realism was defined exactly by the reduction of those conflicts to a combination of balancing tests weighted toward moderation, and legalist faith in the possibility of the judiciary avoiding being political.

My sense was that something that could be called liberal legalism was responsible for liberal professors, lawyers and judges acquiescing or collaborating in the war in Vietnam and the liberal failure to act aggressively against the oppression of blacks in urban spaces. But if legalism was responsible, the question was how. My intuition, very strongly felt, was that our mentor-teachers, the left-liberals, were trapped, in spite of their moderately good intentions. They were enveloped in a powerful consciousness of moderation, which they sincerely felt but which was also subtly self-interested. And which flatly contradicted how ‘we’ felt about things.

How then does liberal legalism entrap, demobilise and flatten everything, and turn them all into collaborators and war criminals? I thought it was a worthwhile question to work on as a law teacher and it was hard to see where else that would be possible.

From Yale you went to the Supreme Court where you clerked for Justice Potter Stewart. What was it like, now a radical, working at the heart of the U.S. judiciary?

I planned to go on the law teaching market while I was at the Court. It was simply, from my point of view, a vehicle to become a law professor. And of course I was curious.

My co-clerks were liberals or conservatives. There were twenty-seven of us and I’m pretty sure I was the only self-proclaimed radical, but many of the liberals would turn out to be pretty left. It was the first year of the Burger Court. Potter Stewart said ‘I hear you’re very left-wing’, and I said ‘Yes sir, I am’, and he said ‘You know I don’t care about that’. And he did not; he just cared about my credentials and my technical competence as a clerk.

The year I clerked was a flashpoint—it was the period about which Bob Woodward wrote the most famous journalistic account of the Supreme Court.¹³ That was the year of the Pentagon Papers¹⁴ and also *Swann v. Charlotte-Mecklenburg*,¹⁵ the bussing case which was the crucial moment when the Burger Court decided whether it was going to role back bussing and decided not to—they blinked at the last minute. The Court also decided *Coolidge v. New Hampshire*,¹⁶ a crucial case in the push-back against civil libertarian criminal procedural law, and *Lemon v. Kurtzman*,¹⁷ a landmark parochial schools case. These four cases were major events, and it was fascinating to be there. But this bore some resemblance, of course, to the bank, the multinational, the CIA and Debevoise. I was still masquerading.

Did you have a hand in any of the judgments?

Absolutely. The experience of writing opinions was amazing. Stewart would say ‘I want to come out this way’ and then you could write it more or less as you wanted, and he would lightly edit it. I was very proud of my rhetorical skills as a clerk in helping Stewart get a majority in *Coolidge v. New Hampshire* and then pushing back against a dissent from the conservative side. The most thrilling was writing a threatened dissent in *Swann* when it looked as though the new conservative majority was going to end bussing. It was an exciting moment: there I was, a bright young staffer. But I had already decided I did not want to do that.

You went on the academic job market in the fall of 1970. Were you open about your radicalism?

I went on the market with a paper, written as a third-year student, about the Hart and Sacks ‘Legal Process’ materials. It was an attack on liberal-legalist thinking about law. The Hart and Sacks materials were the high citadel of liberal hegemonic thought about law and it was very daring to go on the market of liberal law professors attacking it. But I was protected by the fact that radicalism was brand new and appeared to be taking off, so it was plausible for faculties to say we need a radical. All over America, young people like me were screaming and ranting and raving against the status quo. And lots of us were highly academically qualified. We were the top students and we had turned against our elders and they were absolutely determined to co-opt us. It helped that I was one of the first: there were no other radicals on the legal academic market. Of course, many more would follow, and eventually by 1986 you could not get a job in a law school if you were associated with Critical Legal Studies. But I was still hot new property. Faculties were thinking we bet there are going to be a lot of those

¹³ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979). In 1985, Woodward disclosed that Potter Stewart had been his primary off-the-record source for the book.

¹⁴ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

¹⁵ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970).

¹⁶ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

¹⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

people, it looks like the wave of the future, and we should get in on the ground floor and hire a highly qualified one right at the beginning. I had offers from Harvard, Yale, Columbia and Chicago. In fact, at the University of Chicago, Richard Posner advocated for me, sort of on the theory that the enemy of my enemy (liberalism) is my friend, so long as he is a very weak friend.

This was short-lived, though. Already by the next year Yale was firing leftist faculty.

Starting in 1973, I think, Yale denied tenure to six assistant professors including all the ones who were open to more radical kinds of critique. That was truly a sign of the times. But in 1970 it still looked like we were going to be a major force. The next generation graduating from high school in 1970 supposedly made us look like Caspar Milquetoast, like liberal Republicans.

Then the New Left countercultural moment collapsed. Abruptly. By 1973 it was a new world. The ultra radical grouplets had destroyed SDS and they were in turn destroyed, sometimes by the security forces, sometimes by themselves. The Weather Underground was the only remaining thing and they were planting bombs in the men's room in the House of Representatives. Nixon had made it clear that the war in Vietnam would soon be over. And the country's reaction against the cultural movement was clear—in 1972, Nixon won by a landslide over a left liberal who appeared sympathetic to the political and cultural left. But what happened was deeper than a national electoral event—it was a true reflection of a large-scale turn against 'the sixties' that persists to this day. Attica was as important in some ways as the election.

Was this discouraging as a young leftist embarking on a career in legal academia?

With this massive cultural and political rejection, the New Left no longer appeared to be the wave of the future. So our thinking changed. We embarked on what I can't remember which radical icon called the Long March through the Institutions (a self-parodic allusion to the Chinese revolution): we had been crushed at the level of political confrontation but they could not prevent us from regrouping in academia. And we did ultimately regroup.

You had an offer from Yale, but you ultimately chose Harvard.

In Kalman's book, she describes the Yale faculty's ambivalence about whether to make me an offer. At Harvard, they were also completely ambivalent. But I had an idea that the Harvard Law School was hegemonic. The Yale Law School was hegemonic among left-liberals. But the Harvard Law School had real hegemony. If you were going to do the long march through the institutions, the correct institution through which to march was Harvard Law School. The Yale Law School was obsessed with being better than Harvard—they had none of the today's sense that they are clearly the best. And it was still the case that if you got into both, the overwhelming majority chose Harvard: the great mass of meritocratic America just flocked to Harvard.

You arrived at Harvard in 1971 as an assistant professor. You were not alone on the left—Morton Horwitz and Roberto Unger were also junior faculty. Were you collaborating in developing a critical approach or teaching it to students?

Horwitz, Unger and I were all hired in the same year. Morty and I were teaching first-year students. Roberto tried the first-year thing and quickly abandoned it—it was clearly not the right thing for him. He was better for upper-level students who already had some of this influence and also longed for his particular style of radical leftism of that time.

I taught contracts for the first five years, then I taught torts for six years, and then I taught property for five years. If you want to do a radical critique of the system, property and contract and torts are the basis, the building blocks that are shared by everybody: they are understood by everybody as the quintessence of the system. If you can radicalise your teaching of contracts or property or torts, you can radicalise your teaching of anything.

These courses are basic intellectually and conceptually to all the rest of the curriculum, but these were also compulsory first-year courses. We believed we had a message and we wanted to get it to as many people as possible. But we also wanted to challenge the hegemony of the older professors, now in their 50s and early 60s. The most popular teachers had developed the Socratic method into a very powerful, charismatically effective style that was also counter-revolutionary and culturally reactionary. They were terroristic, but also ultra-positivist. They were not formalist—they were all into policy analysis, but policy analysis was a brutal disciplinary tool. And they really did generate a deep, subjugated, pacified consciousness, which was at the same time viciously competitive.

How much success did you have in undermining the hegemonic model of legal education?

That is hard to assess. Morty and I—and then Gerry Frug joined us—had a following amongst students who understood us to be doing something exciting. These were 140-student sections—that is a quarter of the whole entering class—and we were evaluated by the whole 140 students. You would be delegitimised if you were experienced by the student masses as a bad teacher. So a basic requirement of a successful radical leftist strategy of this type was to be able to convince the first-year class that you were a good law teacher, a technician who was helping them prepare for the Bar—maybe less well than Clark Byse or Arthur Miller, who were the tough-guy professors, but at least in the ball park. And that meant you had to sell to them that you were making them competent professionals in their future careers. A second requirement, of course, was that you found the radical content.

Morty was an extremely popular teacher, as was Gerry. I was always somewhat less popular than either of them, but I was popular enough. So as a cohort we were fine and we gradually developed radical left ideas that could be used as organising and building block ideas for the basic subjects. In the 1970s and 1980s, around 10 per cent of the student body would have said they were to the left of liberal. So in a class of 140, that is somewhere between 10 and 20 students.

Several dozen of these students became left-wing law teachers. They were the second generation of Critical Legal Studies and they have produced a very large, very impressive body of radical and left-liberal scholarship. In this sense we did indeed undermine the hegemonic model of legal scholarship. It has never been the same again. But the model also had the strong cultural component of ‘training for hierarchy’, based not just on an abusive mode of Socratic classroom interaction but on a whole gamut of institutional practices that turned out the standard corporate lawyers of the period.

Here what happened was much more complex. We attacked the model directly both in print and by developing counterhegemonic practices of many different kinds. Today, that model is recessive, faded, no longer anything like hegemonic, although it still exists as ‘reactionary’ rather than as the norm. But the new norm is not at all crit; it is either humanist, or merely professional. We participated in a gigantic change in law school culture, and we theorised it to some extent, but what happened was the triumph of liberal niceness for some and merely technical rigor for others. Or both together for the most popular teachers.

Were you also supporting these students outside the classroom?

Sure. As a matter of fact I would say now that I identified with my radical or intellectual left students more strongly than I did with my liberal colleagues. It was part of our politics to form politically based bonds with students who were criticising the school in general and our collegial opponents in particular. That violated the very basic professional norm that your first loyalty was to the institution and to your colleagues however much you disagreed with them. That wasn’t my view. I was more loyal to the left counter-hegemonic project than to Harvard Law School and its faculty. That involved, for example, giving advice and other kinds of assistance to students sitting-in or planning to sit-in in the Dean’s Office. I wrote a piece last year called ‘Left Theory and Left Practice: A Memoir in the Form of a Speech’, in which I described this practice (as best I remember it), so I refer you to that rather than repeating myself.¹⁸

We did attract a radical audience, but it was internally divided. The more *Marxist* students thought we were revisionist, hippy, bullshit. The very hard-organising people committed to direct action also had strong critiques of us. And the students oriented to public interest practice, whether public service or eventually international human rights, they saw us as not putting our money where our mouths were. So there was a theoretical critique from the hard left, there was a radical-action critique from the direct-action people, and there was a failure-to-serve critique from the NGO-public interest people. But we were also a locus for those groups to be together.

¹⁸ Duncan Kennedy, *Left Theory and Left Practice: A Memoir in the Form of a Speech*, 5 *TRANSNAT’L LEGAL THEORY* 577 (2014).

What about your intellectual production? The first thing you published after arriving at Harvard was ‘Legal Formality’, in 1973.¹⁹ This was a critique of legal positivism and liberal legalism’s doctrinaire separation of rule making and rule following.

‘Legal Formality’ was published in the *Journal of Legal Studies*. When I was on the job market, I interviewed at the University of Chicago and my host was Richard Posner. He saw right away that we were common spirits in our contemptuous rejection of what we saw as the intellectual flabbiness of the hegemonic legal academic and liberal mainstream—although he lost his enthusiasm as soon as it appeared that Critical Legal Studies was actually competing with Law and Economics for legal academic recruits. At that point, he was founding the *Journal of Legal Studies*, the Law and Economics journal at Chicago, and he asked me if I would like to contribute to the second volume. I wrote the article very quickly and then started to work on my first major project, *The Rise and Fall of Classical Legal Thought*.

Why the turn to intellectual history?

I had been reading all these ambitious leftists: Marcuse was a big influence on me at this time—*Reason and Revolution* specifically²⁰—and Sartre. My idea was that liberalism—American moderate centre-left liberalism—should be the object of critique. I saw it as a conservative, deadening ideology that snuffed out the possibility of radical transformative social change. I was still becoming more and more radical during this period and was interested in how serious disruptions happen in history. The first step, though, was to figure out why it was that this apparently benign American tradition of political liberalism seemed to be mainly defined by the war in Vietnam, the disintegration of American urban ghettos, a situation of violent political repression, total resistance to the women’s movement, and general cultural deadness. *The Rise and Fall of Classical Legal Thought* was trying to figure out, within law, what the sequence was that brought us here.

It certainly was an ambitious project: a history of American legal thought from the early 19th century—not a history of legal doctrine, but of legal thought, the conceptual apparatus and reasoning techniques employed by jurists.

At the time, it was a giant project, much longer in fact than it ended up being: it was supposed to be on the scale of Pollock and Maitland’s *History of English Law*.²¹

But it was also a revision of the progressive historiography that cast the Lochner-era as reactionary and formalist in contrast to a more enlightened liberal present.

¹⁹ Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

²⁰ HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (1941).

²¹ FREDERICK POLLOCK & WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (1895).

Yes, it rejected the traditional narrative of bad formalism leading to good post-realist policy-oriented liberalism. But it also was an intervention in legal theory. I wanted to denaturalise contemporary liberal legalism: I argued that the liberal legal order of today is totally contingent, a product of particular historical sequences, and it has bad political consequences. Not political consequences in the sense of distributive consequences, but in the sense that it is a legitimising ideology, a centrist status quo ideology. I developed this idea much more elaborately in the opening part of ‘The Structure of Blackstone’s Commentaries’, where I set out a left genealogy of this set of ideas, but I did not publish that until much later.²²

For a long time, through the late 1970s and 80s, Rise and Fall circulated as an unpublished manuscript. In fact, you never completed the originally envisioned book and what you had written was only published quite recently.

Beard Books published it as a reprint of the manuscript in 2006,²³ and I wrote a preface in which I tried, again subject to the weaknesses of memory, to reconstruct the project and the context. I wrote the original manuscript largely between 1973 and 1975 in order to get tenure. At that time, you could get tenure without publishing. We had to produce legal scholarship, but there was no discussion that it had to be published. I continued working on the manuscript of *Rise and Fall* after getting tenure, but ultimately abandoned it in 1979.

You received tenure in 1976. This was a somewhat dramatic experience.

The year before I was hired, Derek Bok had become the dean of the law school. He was a liberal reformer and very preoccupied with the status of Harvard Law School and he was concerned with the fact that Harvard’s prestige was in danger because so many members of the faculty had never written anything and clearly were never going to. Some of them were famous teachers, like Paul Bator, and others of them had just never produced much. Bok believed that the faculty needed to be shaken up. He extended the time until tenure from three years with no formal requirement of scholarship to five years with a requirement that one produced legal scholarship (although publication was not central to this idea). And he hired Horwitz, Unger and me, because we were intellectuals and sort of innovative and a little wild, and the fact that we were leftists was fine with him as a liberal, open person.

My relations with my colleagues were complex. I had quite a few strong friendly relations with senior colleagues. But it was clear already by 1976 that the three of us—Horwitz, Unger and I—were in some ways disrupting the school. We were clearly doing something other than innovating within the tradition. There was an edge to our work and our teaching that in some sense was attacking, denying, or evading some of the

²² Duncan Kennedy, *The Structure of Gladstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979).

²³ DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (Beard Books, 2006). The first chapter was published in 1980 as *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980).

strong, shared values of the dominant group in the faculty. Although not everybody was opposed—there were various senior colleagues—like Henry Steiner—who were totally supportive from the beginning. Of the three of us, I was the most controversial and I aroused the antagonism of at least three very influential senior members of the faculty, all of whom were on the appointments committee: Clark Byse, Phillip Areeda and Paul Bator.

Morty and Roberto came up for tenure the year before me. Morty because they gave him credit for two years he had been a teaching fellow, virtually a member of the faculty. And Roberto asked to come up for tenure a year early, so he came up after four years on the basis of *Knowledge and Politics*,²⁴ and had virtually finished *Law in Modern Society*.²⁵ They went through swimmingly with no problem. I then asked to come up a year early on the basis of ‘Legal Formality’, which was much more than most of the members of the faculty had done to get tenure, but it was not obvious, one way or the other, whether it met Derek Bok’s prescription.

Bok by now was no longer dean of the law school.

Bok was now president of the university and the dean was Albert Sacks, a moderate leftist liberal. But the committee contained all the people I had antagonised. It was strikingly centre-right and it contained just about everybody who had clearly indicated that they thought we were a threat.

The committee took up the question and decided no, they were not going to advance me. They said to keep working for another year on my long manuscript—*The Rise and Fall of Classical Legal Thought*; they clearly indicated that it did not have to be published—and they would consider me for tenure a year later.

At this point, inside the faculty, it was clear that there were some questions about whether I was going to get tenure or not. I submitted the manuscript in the fall and then I did a number of rebellious things that were either stupid or really good. At the very least they were pretty bold. First, I went to the dean and I said: ‘I don’t think it’s fair to have Clark Byse on the committee that is considering me because he hates my guts and he lets doors slam in my face.’ And the dean took Byse off the committee, which was admirable on his part.

At that time, there were no student evaluations as part of the tenure process. To evaluate professors coming up for tenure, members of the committee asked students they knew personally to come to their offices and report their views on a given teacher. So I said to the dean: ‘I have real reservations about this system. These guys all have very strongly indicated that their students understand already that I am not the guy, so I think it is not fair to not poll the student body as a whole.’ And as a result they changed the process: they did a random sample, which has continued to be the practice. I actually brought about a reform: it was really scary, but it looked like I would be fucked if the process went the way they wanted it to.

²⁴ ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975).

²⁵ ROBERTO UNGER, *LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY* (1976).

Finally, there were the class visits, and these were a nightmare. The Dean informed me that all seven (I think) members of the committee would like to visit my classes. This was unusual at the time, when very minimal visits were typical, but it was only a request pro forma. I graciously agreed but asked the Dean for permission myself to visit the classes of my visitors. This was a little crazy. But I did go to several of their classes, as a kind of counter-terror gesture. Unfortunately, Paul Bator, the most serious potential enemy, wasn't teaching that semester. He came to my Contracts class and sat in the back row, head down, writing furiously for the whole hour. Then he called me up and he said: 'That was very interesting, I'd like to come again'.

The committee then seemed not to be meeting and nothing seemed to be happening. Larry Tribe and Frank Michelman were the young members of the committee, but all the others were older, conservative people, except Milton Katz who was a liberal. Somehow Morty and Roberto, who had been granted tenure the year before, both began to get the idea that I was in trouble. So they each went separately to the dean and said: 'You just have to understand that if you don't give Duncan tenure, I will go elsewhere'.

Had they spoken to one another about doing this?

I don't know. But it was extremely impressive: they were basically saying they would quit if I was not given tenure. After that, the committee just did not decide. Usually these things were over in a month. I had submitted in September and then Christmas came and they still had not decided. Everyone was constantly telling me there was no problem, everything was totally fine, there was nothing to worry about, they just had not decided. Larry and Frank were incredibly nice. They were completely in solidarity: they did not give me any inside information, but they made it clear that they supported me, and that I did not need to worry.

Nonetheless, it was long enough that I began to think about what I would do if I did not get tenure. I made a few preliminary inquiries at Northeastern. And then an amazing thing happened. The semester had ended without any decision having been made and it was now Christmas vacation. Just before Christmas, I had a conversation with Jim Vorenberg who was on the committee and would later become the next dean, and he said to me: 'You know Duncan, I've read your thing and I respect it, but when this is over, I'd like to have a conversation with you. Why would anyone want to write anything like this?' It was a completely honest, humble 'maybe there's something about this I don't get Duncan, but why would you want to do something like this?' And that was incredibly reassuring—it was the best possible thing he could have said. The committee then held an emergency meeting between Christmas and New Years—they were never scheduled to meet then—and they voted me unanimously. And then the faculty met in the new year and approved my tenure.

This experience must have left an impression on you and shaped your attitudes about the law school and the critique you later developed of hierarchy in legal education.

Yes, I think it is important to say that the tenure process and the struggles that happened during the tenure process, were, and still are, central to the experience of being a left academic. Most experienced the process as very psychologically deep, almost always embittering, alienating, and solidifying of a left identity. And the way one dealt with it had classic right-of-passage overtones that are very familiar from an anthropological literature about induction into social groups—Erving Goffman, for example. The development of a strategy for enduring it was, I think for all of us, very important. But none of us felt that we did brilliantly. It was scary, compromising, and you lost some sense of connection to the group. So one of the parts of the general critique of hierarchy in legal education, for me, was a critique of the tenure process.

After getting tenure, the next thing you published was ‘Form and Substance in Private Law Adjudication’, a highly original analysis of the contradiction between—and the legal implications of—contrasting individualistic and altruistic orientations. The former, you argued, favours precise rules and the latter generalised standards.

I was writing ‘Form and Substance’²⁶ right through the tenure process: it was one of the ways that I kept my sanity during the process. The idea was it would be a current intervention, as opposed to the historic, genealogical approach of *Rise and Fall*.

It was an intervention in legal theory, and specifically private law, using what I had learnt teaching contracts to produce something that could be a methodological innovation representing a particular left sensibility: contradiction is everywhere, there is no theory that resolves the contradictions, and to be a leftist is to operate within a contradictory field in a particular way. The contradiction between our good and our bad sides is internal, but we have multiple good sides and they are in internal conflict too. And there is no way in which law or legal thought resolves it in any way that has any legitimacy whatsoever: any resolution is totally existential, driven by political passion. It drew very intensely on Sartre, and also Camus.

How did it come to be published in the Harvard Law Review?

Susan Estrich, who later became a Harvard law professor and was Michael Dukakis’s 1988 presidential campaign manager, was the first female president of the *Harvard Law Review*. She was a non-radical: on the left, but a non-radical progressive. She was interested in the *Harvard Law Review* publishing stuff that established it as avant-garde and so she solicited the article, before I wrote it, informally. Then it went through a heavy editorial process in which quite exceptionally I managed to keep all the unconventional parts intact. The editors were not leftists; they were moderate liberals who gave me great editing, but they didn’t really understand it that well at first, and then as they understood it better they disagreed.

²⁶ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

There were left students on the *Harvard Law Review*, just not working on my article. Left students actually made the *Harvard Law Review* much more frequently in those days than today. So, for example, Karl Klare, Mark Kelman and Peter Gabel all made the *Harvard Law Review* on grades but refused to join for political-cultural reasons.

The article is considered now a seminal text of Critical Legal Studies, but it was certainly an unusual law review article for its time. How was it received?

I presented it at a faculty workshop, about a month before I got tenure. Some people loved it and some people hated it and some people thought it was very interesting and didn't know what to make of it and some people were bored by it. It got a lot of attention, and I am still grateful for the positive attention and thoughtful reactions.

The most innovative thing about it, from my point of view, was that it was neither doctrine nor policy nor philosophy. It was a critical analysis of a discourse—not of a rule, not of concepts, but of a discourse. That was what was most striking about it, along with the various ways in which it was formally innovative.

I've always understood myself as a modernist. By modernism I mean avant-gardism: aesthetic formal innovation. The ambition is to be totally the master of conventional forms—in this case the law review article is the form, and it's just like the sonnet, a completely established highly formalised way of doing things, less so now than in 1960 or 1970, but it is still very formalised. So the idea of being a modernist aesthetically was to do things to the form that catch the eye or the attention of the reader because they're inconsistent with the rules of the form but consistent with a message. That is, they're not random deviations. The deviations convey something; they play on formalism in order to achieve effects. So many of my articles, but not all of them, have exactly that ambition, in one way or another, directly inspired by modernist art. The idea is that we can be the modernists in legal literature.

You were starting to engage with Marx at this point—in fact, you formed a Marx Study Group around this time.

The Marx Study Group was basically the product of my relationship with Karl Klare. Karl was my student—he started at Harvard in 1972 and finished in 1975. He was really quite Marxist in his student stage; he'd been a big SDS activist. After law school he went to work for the National Labour Relations Board and then for a private labour law firm. I actually tried to get him a job at Harvard, which was my first attempt to influence the appointments process. It totally failed, but by then we were close friends. We understood ourselves to be political radicals with intellectual agendas and he was very knowledgeable about Marxism, in particular Western Marxism as it was called. He proposed that we have a reading group, which he would organise in the sense he would choose the readings; it would be very small and it would be collective.

The other people in the initial organisation were all close friends, though not everybody stayed equally friends after that. There was Gary Bellow, Jeanne Charn,

Nancy Gertner and Kathy Stone. All were at the beginning of their careers, except Gary who was already the director of the Harvard Law School Clinical Program. We met maybe five or six times a year, for many years with changing personnel. We began with Karl's vision of the appropriate genealogy, which began with Marx's *Economic and Philosophical Manuscripts*, his essay 'On the Jewish Question', and long chunks of *Capital*. We spent quite a bit of time on *Capital*—all of volume one—and then we read some Lukács, some Poulantzas, some Althusser. We also read the Perry Anderson-EP Thompson debate, which was one of the great moments in the history of left thinking in the West.²⁷ It's just fantastic, because they're both so intellectually powerful. I'm much more sympathetic to Poulantzas, Althusser and Perry Anderson than I am to EP Thompson—it's only when he's being a structuralist that I like him. So I don't like *The Making of the English Working Class*,²⁸ but I love *Whigs and Hunters*.²⁹ For me there's an enormous difference.

How did your engagement with Marxism in the Study Group influence your own writing?

'Form and Substance' was written before the study group and much more influenced by structuralism, but from 'The Structure of Blackstone's Commentaries', Marxism was a very big influence, though often as the foil. The base/superstructure distinction, instrumental Marxist theories of law, vulgar economism: all were big targets. At the same time Marx's theory of conflict as the motor of history, class struggle, ideology critique, and his exquisite polemical historical writings, especially 'On the Jewish Question', were foundational for my work. Even in 'Form and Substance', the relation between individualism and altruism is framed as a 'contradiction', not in the logician's sense but in the Hegelian/Marxist sense, which I got from Marcuse, who I had read in law school and who had an enormous impact on me.

But 'Form and Substance' is not an identifiably Marxist intervention.

Although it was understood by everyone as a very radical leftist article, a very overtly political article, you're right, it wasn't Marxist or liberal. Its orientation was contradiction, the contradictory character of moral existence. So, if anything, it was Nietzschean or Kierkegaardian or something like that. The basic proposition was that everyone of us exists in a situation of doubleness and ambivalence in our ethical orientation. Now, nothing could be further from the tone of the American left in the 1970s than that. The overwhelmingly dominant modes were morally certain: politics and morality fuse; correct political morality is leftist political morality and from the commitment to a leftist political morality there follows a left program and left practices.

²⁷ EP Thompson, *The Peculiarities of the English*, 2 SOCIALIST REG. 311 (1965); Perry Anderson, *Socialism and Pseudo-Empiricism*, I/35 NEW LEFT REV. 2 (1966). See also EP THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* (1978); PERRY ANDERSON, *ARGUMENTS WITHIN ENGLISH MARXISM* (1980).

²⁸ EP THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963).

²⁹ EP THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

The structure of the article is a nesting structure in which the same contradiction—between individualism and altruism—reproduces itself inside one domain after another. The contradiction is established in a highly technical form at the beginning, starting with contract law, the statute of frauds, etc. and then it gets bigger and bigger until it's a conflict of world-views. But the conflict of world-views is internal rather than a conflict between capitalism and socialism: it's internal to socialism and internal to capitalism. It's not law versus morality. Rather, it's inside law and it's inside morality. In that sense, then, it was not only a critique of law, but also an implicit critique of the left for its radical failure to take seriously the internal contradictory character of moral experience.

It's around this time that Critical Legal Studies takes shape as a concrete movement. The first CLS Conference was in 1977. How did that come about?

In the fall of 1976, David Trubek had a dinner to try and figure out if this was a moment to put together various left, or genuinely progressive, academics to have a meeting. I had been Trubek's student, but by this time we were close friends, and as was true with Morty and Roberto and Karl at the time, we trusted each other's political instincts. We decided we would hold the meeting in Madison because David was by then a professor at the University of Wisconsin and he could get money from the law school. Then we decided on a list of people we would ask to be on the letterhead of the call to the meeting, and I drafted the letter and Mark Tushnet, who was at Wisconsin and the co-host agreed to sign it.

Who did you end up inviting?

There were three main groups. First were the legal sociologists. Trubek was involved in the Law and Society Association—the American sociology of law network. It's an interdisciplinary network: law professors and social scientists, most of them progressives. The big guns were Lawrence Friedman, Marc Galanter and Stewart Macaulay. And also Willard Hurst, who was a generation older. Trubek was aligned with them—they all had connections to the University of Wisconsin faculty. They understood themselves as representing social theory: they'd read Weber and all thought they've read a little Marx, although most of them had never taken him at all seriously—in the anti-Communist universe of their generation, nobody *really* read Marx.

Then there was the Harvard network. Neither Unger nor Horwitz could come in the end. But there were a number of our present or former students: Mark Kelman, Karl Klare, Kathy Stone, Joe Singer, Lucie White.

And finally there were the Yale people, many my friends from law school who had gone onto become law professors, people like Mark Tushnet, Rand Rosenblatt, and Ann Freedman. There were also Peter Gabel and his friend Alan Freeman, both of whom would become central to the movement but were just getting to know the group.

How much theoretical and political coherence was there to this coalition?

The legal sociologists, social-theory-oriented progressives, represented an older generation. They also had a very professional understanding of the sociology of law:

they understood themselves to be distinguished members of the academic profession of sociology. So although they wrote about law, they preferred books to law review articles, disdained mainstream legal academics as formalists, and wanted to be respected by sociologists. Weber and Durkheim were the overwhelming theoretical influences.

Within our generation—including our students—the divide was between the Marxists and non-Marxists. The Marxist strand was represented by Kathy Stone and Karl Klare, who saw themselves as having a strong Marxist background, and Rand Rosenblatt and Mark Tushnet. Someone like Mark Kelman, in contrast, was a much more cultural, completely anti-Marxist, radical.

Of course not everyone was either a Marxist or a non-Marxist. There were also people in between who had a complex or ambivalent relationship to Marxism. That includes me, as I explained a minute ago. We were anti-dogmatic New Leftists radicals, nonetheless obsessed with theory.

These generational and political differences were, in the end, too great. Certainly no one associates the legal sociologists with Critical Legal Studies.

Mark Tushnet was the spokesman for the Marxists and he gave a speech at the end of the first day in which he said no serious theory of law is possible without the labour theory of value. When Mark made the speech there were only about 35 people in the room, but you could see just about a million different expressions. This is what provoked Galanter, Macaulay and Friedman to basically walk out. They didn't actually walk out; they just didn't come back for the remaining sessions.

So the original coalition formation was fractured from the first day, and at the end of the conference it was clear that Trubek couldn't deliver the sociologists. That wasn't his fault. But we would have been an infinitely more respectable and plausible movement than we became had we managed to ally with them.

Was this a coalition that you were desperately trying to hold together?

My attitude was that if it could be prolonged, that would be great. What that meant was if they could accept our radicalism, then we could have an alliance; if they could deal with us, we could deal with them. For people of their generation, a liberal intelligentsia who hated radicals, it would have been a major accomplishment and it's no surprise they couldn't manage it. I don't hold it against them and I didn't at the time. If you have this generational concept, you can't really complain when they act like the other members of their generation, just like we were acting—Mark Tushnet's gesture was a perfect example of 60s stuff: he basically gave them the finger.

The younger generation were no more convinced by Mark than the older generation. It was by then an old-time idea, the labour theory of value. Most of us were reading and thinking about Marx a lot, but nobody believed in that way of understanding the theory. Still, Mark's talk was great. It was still the world of red-baiting, so to do it took real courage, even if politically it was totally misguided and actually absurd.

Given your allergy to the labour theory of value, was your feeling towards Mark and the other Marxists the same as towards the liberals: we'll have them if they'll have us? Or were you more sympathetic to the Marxists?

Much more sympathetic. Mark actually abandoned the labour theory of value soon thereafter. They were my buddies—they mocked me and I mocked them, but we were completely aligned.

Michael Tigar was also a Marxist who spoke at the conference, but he didn't become part of the Critical Legal Studies movement.

Tigar was a famous American radical, a Marxist law professor at the University of Texas. He crashed the meeting and gave not a labour-theory-of-value speech, but a Marxist-theft-of-wood-anticipates-everything-that-the-modern-leftist-can-think-of-and-it-is-really-the-working-class-that-counts speech. He was wearing cowboy boots and a cowboy shirt and arrived with a very beautiful girlfriend who may have been his wife. He represented, again, a totally radical 60s thing; his message was basically 'you arseholes, you don't even know what class struggle or class violence is'. By this time the Weberians had left. Tigar said we need an organisation: we need an organisation and we need a central committee; we need discipline if we're ever going to accomplish anything. He was just a joke, though he really didn't realise it. He didn't know a single person but somehow imagined he would emerge as the leader of a new organisation.

What was the organisational structure of CLS?

We were committed to anti-organisational lines. The idea was that it was a network not an organisation. We were representative of the New Left reaction against the party-building groups. The basic organisational strategy of CLS was no formal organisation except for an annual conference and an occasional summer camp.

The annual conference was simply in the hands of a young professor at a law school who was willing to put in the time and energy to organise it—Karl Klare, Peter Gabel, Alan Freeman, me, Jay Fineman, Gary Peller, Jamie Boyle, to name a few. The organiser put together the programme. Everyone was invited. There were no institutional or professional distinctions: anybody could come and there would be enough panels so that every person who wanted to could be on a formal panel (incidentally allowing them to hit their deans up for travel money). And the panels would not be structured in a hierarchical way. This was unheard of in organising conferences at that time. Eventually the organisational impulse prevailed to the point where a formal organising committee came into existence, but it never did anything at all.

This reminds me of a discussion at one of the earliest informal meetings of interested people (I think at my house in Cambridge). There was a discussion about who we should ask to give an honorary address at the next conference. Rand Rosenblatt and Mark Tushnet suggested we ask Louis Althusser. So they tried to reach Althusser: they telephoned, they sent letters, they sent telegrams (which still existed) but they just could never get in touch with him. Why? Because, as we learned only a year

or so later, Althusser the previous year had killed his wife and was in a mental hospital. We actually imaged that Althusser would come to the United States and address 70 or so young law professors and law students. So next we also tried to get Poulantzas. He wasn't in a mental hospital but for some reason that didn't work out. In the end we got Carl Boggs, an American sociologist who had written a well-known book about Gramsci.³⁰ He wasn't great because he made no effort to figure out what it was about. I wonder what the big A or the big P would have said.

CLS remained a diverse movement with various strands of thought. What was the most basic theoretical division in these early years?

Already in 1975, Morty Horwitz and I were arguing about a series of different methodological issues that had a lot of influence on the first stages of Critical Legal Studies at the intellectual level. Morty was allied with the Marxists around the basic idea of history as a totality which has both ideal and material elements and in which theoretical formations serve interests. In terms of law, legal thought—ways of conceptualising the legal order—and doctrinal complexes have a political valence. They come into existence as aspects of ruling class projects. There's no requirement that it be highly conspiratorial or even highly conscious, but let's face it, freedom of contract is the doctrine of the rulers of the economy, they're the ones who believe in freedom of contract and freedom of contract in principle serves the interests of the ruling class.

*This is Horwitz's thesis in *The Transformation of American Law*.³¹*

Which came out exactly at this time. Our controversy was not about the concrete effects of the legal regime as a whole. What do these rules do? We agreed they distribute unequally and they're an important element of an oppressive system, one that ought to be radically, structurally transformed. The question is rather about the role of ideologies and role of ideas and theories.

In *Rise and Fall*, I was all for the idea that specific interests through their lawyers work to develop law that favours them. In that sense the new doctrines that are constantly emerging 'reflect' the interests of those who promoted them. The question is whether this link is 'essential' or 'necessary'. This was another way of asking whether the given doctrine or principle or concept was biased, or intrinsically 'tilted' toward the interests that promoted and benefitted from it.

My line, repeated at a dozen crit events, was that the problem was not bias but indeterminacy. In other words, interests exploited indeterminate law to promote their objectives, but the indeterminacy made it possible for conflicting interests to struggle to develop it in other directions. Fine, Morty would say. But then my final argument was that the very doctrines developed to promote, say, the 'interests capital' were themselves indeterminate, not 'inherently' biased. So they were available for counterattack and reconfiguration—freedom of contract was a contradictory doctrine,

³⁰ CARL BOGGS, *GRAMSCI'S MARXISM* (1976).

³¹ MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

used by labour at the end of the 19th century as much as by capital. The labour versions failed not because of bias but because of power.

For Morty, the structure was the product of an overall configuration of interests. It comes into existence to serve the interests and it works. Its internal logic fits or tilts towards the interests. So the internal logic of Classical Legal Thought should be conservative and the internal logic of Social Legal Thought should be progressive. The idea is that the legal structural construction is made intelligible by its origin and its results: it comes in through the interests and it's constituted as a thing, as an intellectual structure, which has consequences when operated.

The strongest version of the counter-attack, set out in 'Form and Substance' and subsequent articles, was that everything that Morty argued was intrinsically right-wing ideology was in other situations left-wing ideology. So it couldn't be the ideology that was causing the outcomes. Now, he said we were depoliticising the whole thing through the indeterminacy thesis, while we argued no, we're making it concrete rather than abstractly political.

How were these debates, and CLS more broadly, understood by the rest of the legal academy?

The main way to interpret a person in America who is saying 'do something radical to change the status quo' is to assume they are either communist or nihilist. One person says you're a communist and another says you're a nihilist. These are senior grown-ups who are older than we are, that feel they know how to interpret ideas, and whether we think we're communists or Marxists or not makes no difference. They are doing the interpretive act and they have a set of categories for radical leftists: we don't believe in law, we believe it is indeterminate; we also believe law is determined by class interests; we also believe the only way to deal with law is through violent revolution. But there is amazingly little actual encounter with what we wrote.

Legal Education and the Reproduction of Hierarchy,³² with its critique of the law school and egalitarian vision of what legal education could become, retains its salience for many law school students today. What was the motivation behind writing a pamphlet on legal education?

I was reading a lot of Situationist literature, including Debord, and a lot about the Russian opposition to Stalin. I was interested in the question of how to produce political resistance or opposition. The pamphlet and the poster form were big things that I was reading about and I was attracted to this aesthetic tradition, which was also a

³² Short versions were published as Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) and Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW (David Kairys ed., 1982). The complete version was self-published in 1983 as LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM and republished, by NYU Press, in 2004, with a new introduction and afterward, as LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION.

political tradition, of the pamphleteers. So I wanted to enter the tradition by self-publishing a pamphlet.

My pamphlet was addressed to students and to members of the emerging CLS network. I shipped about 100 along to the CLS conference at, I believe, American University in 1984 and I wanted to distribute it at the registration desk, but they arrived late and they wouldn't let me put it on the desk. Only about 20 of them were picked up and I had to pay to ship the rest back to Cambridge. Then I thought the Harvard Book Store, which is still there in Cambridge, sold a lot of radical stuff and so I got them to sell it. I had the intoxicating experience of selling it for the cost of production, and I sold probably four or five thousand copies over the next seven or eight years. People would also order it; the National Lawyers Guild chapters would sometimes order copies.

What was the reaction to it?

On the one hand, it was one of the bases of the charge of Maoism:³³ the Utopian Proposal at the end called for equal pay for everyone, random admissions for law school, equalisation of law schools by random assignment of professors within a given geographical area. It still makes me laugh even to list these things. It was totally in the mode of provocation. The substance was a novelistic but also social theoretical take on how law school worked as indoctrination. The novelistic aspect is still what 'works' (in the modernist sense). The thing that gave it success was people identified with it, namely students. It had a very big effect in the sense that many people have told me it really grasped their experiences of first-year teaching.

You returned to the subject of legal indeterminacy in another seminal CLS article, 'Freedom and Constraint in Adjudication: A Critical Phenomenology', published in 1986.³⁴

From my point of view, it is the single most important theoretical contribution at the level of critical theory that I have made. It is also novelistic, just like *Legal Education and the Reproduction of Hierarchy*.

What was the motivation in writing it?

It was deeply influenced by another study group that I did with Alan Stone. For about four years we met every three or four weeks. First we read *Being and Nothingness* by Sartre³⁵ and then we read the second part of *The Phenomenology of Mind*.³⁶ The article, as it says at the beginning, is a direct attempt to marry *Being and*

³³ See, e.g., Joshua D Wright & Douglas H Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1 (2012).

³⁴ Duncan Kennedy, *Freedom and Constraint: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

³⁵ JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (1943).

³⁶ GWF HEGEL, *THE PHENOMENOLOGY OF MIND* (1807).

Nothingness to some canonical legal realist texts, but at the most philosophical level. It is methodologically phenomenological and deals with the question of the ‘is-ness’ of law and the meaning of freedom and constraint with respect to law. As far as I know, it was the first time that method had ever been applied to the specific question of law’s objectivity, long an obsession of legal theory and jurisprudence.

How does this methodological approach inform your theory of indeterminacy?

The central question is whether a legal result is ever compelled. Is indeterminacy a function of the legal materials? Is it correct to say some legal doctrines are determinate and some legal doctrines are not determinate? No. So the article is an attempt to formulate an indeterminacy theory that is not based on determinacy as a property of an exterior object, namely the relevant legal materials. The idea is that determinacy is an experience, not a property of the materials: it’s a result of an encounter between an interpreter with an agenda and materials understood as a partially resistant medium. Whether the result is determinate depends on what you try to do. If you can’t do what you want—your agenda—and you’re forced to do something else, it’s totally determinate. But the determinacy is not a property of the materials. You’re always under a time constraint, so it just means that when your time ran out there was no way out of the box. The materials seemed to determine the outcome, but we all have the experience that if you gave me another ten minutes I could come up with a different interpretation and conclusion.

The article attempts to give an elaborate, novelistic reproduction of the experience of something that appears to be completely determinate which, as the result of work and chance, and maybe *something* to do with the materials, suddenly turns into the opposite. Determinacy is an experience, but the dissolution of determinacy through work in time is equally an experience. That is, determinacy and indeterminacy are both experiences, but neither can be attributed to anything other than the totality of the encounter of an interpreter with skills and interpretive resources, an agenda, the materials, and other constraints. I see this as a radical ontology in the tradition of Hegel, Husserl and Sartre.

How was the article received by legal academics?

I presented a version of it at a conference on the rule of law at Osgoode Hall in Toronto. The organisers asked for a very short version for an edited collection, *The Rule of Law: Ideal or Ideology*.³⁷ In my piece, I said indeterminacy is *not* a property of the materials and the editors thought ‘not’ was a misprint: Duncan, they thought, must be saying it’s a property of the materials. They deleted the word not, which gives an idea of how counterintuitive the basic idea of the article was (and is). There were page proofs, so I caught it at the last minute.

At the conference, my talk was very appealing to the lawyers. They loved it as a phenomenological account of the experience of lawyering, but no legal academic had

³⁷ Duncan Kennedy, *Toward a Critical Phenomenology of Judging*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 141 (Allan C Hutchinson & Patrick Monahan eds., 1987).

any reaction to it or responded to it in any way. It was just off their chart. The literary, rhetorical dimension of it was an appeal to the practitioner: I know what it's like to do what you do.

I was also invited to not one but four judicial conferences. Judges read stuff about judges and judging and they were very interested by what I had to say. Their consensus was that I had overemphasised the amount of discretion and open texture: 'just about everything we decide is determined by the legal materials. And, moreover, even when it is indeterminate and also important, there's nothing political about it. Society is moving in a particular direction and the law changes, so it's true that sometimes we change the law, but it's not political; we do it in accordance with the changes of society'.

The full version of the article was published in the *Journal of Legal Education*, the organ of the Association of American Law Schools. The Association had by then decided that Law and Economics and Critical Legal Studies were legitimate parts of the legal academy, so the editor was happy to include a long article from a spokesman of CLS. Now the *Journal of Legal Education* is distributed free to every law professor in America. So there were literally about 6,500 tenure-track law professors in the country at that time and every one of them received a copy of the article.

Eventually there was an indeterminacy debate that took off from this article in which analytical jurists denounced it as confused and meaningless. It's quite an interesting debate, but it had nothing to do with me.

In addition to your contributions to legal theory, you've also devoted significant energy to practical political projects. Your work, for instance, on low-income housing very consciously made an instrumental use of legal practice and doctrine to advance concrete leftist goals in Boston's Jamaica Plain neighbourhood. How did you become involved in that work?

I became involved through my friendship with Gary Bellow and Jeanne Charn. Gary had been the principal lawyer for California Rural Legal Assistance when it worked with Cesar Chavez in organising the United Farm Workers. He'd been involved in a lot of heavy shit in the political confrontation between Chavez and Reagan, who was then Governor of California. Gary came to Harvard in 1971 and Jeanne was his wife. They were participants with us in the Marx Study Group, as I mentioned.

Gary and Jeanne set up the Legal Services Center in 1979.³⁸ This was a Harvard clinical programme that was funded by Harvard but also funded by the Legal Services Corporation, through which a very large amount of money flowed to fund neighbourhood legal services all over the US. The Legal Services Center represented an idea for a political strategy on behalf of occupants of low-income neighbourhoods in cities. The idea was to start out by developing a model from a single neighbourhood, Jamaica Plain. This was a low-income neighbourhood, which in the late 1970s was undergoing disinvestment, as well as the start of gentrification on its edges. In this sense it shared characteristics true of quite a few large American cities in the late 70s.

³⁸ The Center was originally named the Legal Services Institute.

I became involved because a few years after I got tenure, Albert Sacks, the dean, suggested that I might be interested in this and I went and spent a semester at the Center during which I didn't teach at Harvard. I continued there part time for another semester and then I wrote some briefs and did other casual legal work there for the next few years. After my first year of involvement, Jeanne and I created a new course at Harvard called Low Income Housing Law and Policy. We taught the course together for about 15 years, and it was a vehicle for the development of some ideas that fed back into the practical work of the Center. Our idea was for a very aggressive theory-practice totality.

In the piece I mentioned above, 'Left Theory and Left Practice', I gave a quite full description of the strategies of the Center. I tried to describe how crit thinking about the distributive dimension and the legal dynamics of the background rules of class conflict in law can influence strategic choice of radical actors. I think I'll leave it at that so as not to repeat myself.

In the early 1990s you changed direction somewhat, engaging with the rise of identity politics in legal academia—critical race theory in 'A Cultural Pluralist Case for Affirmative Action in Legal Academia'³⁹ and feminism in 'Sexual Abuse, Sexy Dressing and the Eroticization of Domination'.⁴⁰ This seems somewhat of a break from your earlier work.

It was certainly a break and it was supposed to be. Those two articles are directly my engagement with Critical Race Theory, in the case of 'Affirmative Action' and feminism, particularly radical feminism but also cultural feminism, in the case of 'Sexy Dressing'. They were part of the political project of Critical Legal Studies, which as I saw it was to create an alliance both at the practical level and at the theoretical level with, and try to take seriously, these new identity political groups that are not just identity political: they're also producing incredibly interesting theory. If you want to do serious politics in America in the late 80s and 90s, you have to engage with these movements. This is the agenda I set out in 'Radical Intellectuals in American Culture and Politics'⁴¹ and 'Affirmative Action' and 'Sexy Dressing' follow from that. All three are included in *Sexy Dressing, etc.*⁴²

Along with 'The Stakes of Law, or Hale and Foucault!'⁴³ In that article you, drew on the work of Robert Hale and Michel Foucault to develop an analysis of law's distributive effect—or, in your words, the role of law in the reproduction of social injustice in late

³⁹ Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990).

⁴⁰ Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309 (1992).

⁴¹ Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, 1 RETHINKING MARXISM 100 (1988).

⁴² DUNCAN KENNEDY, *SEXY DRESSING, ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993).

⁴³ Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991).

capitalist societies. How does 'Hale and Foucault' fit into the rest of the book's organisational scheme?

A basic idea of 'Hale and Foucault' was the significance of background legal rules that are generally regarded as invisible. For example, when people think about what determines the outcome of a distributive conflict, they tend to ignore the role of law. But it is law that sets the background rules of the conflict and conditions its outcome. The importance of background rules is a theme also of 'Affirmative Action' and 'Sexy Dressing'. All the private law rules governing the genders, for instance, are treated as very significant factors.

Janet Halley describes in Split Decisions⁴⁴ how the 'Sexy Dressing' article upset a lot of feminists. Why were they so annoyed?

That's a hard question to answer. It was clear that it did produce a lot of very intense negative reactions, as well as a lot of intense positive reactions. I don't want to speak for people who didn't like my article by saying why they didn't like it, but I anticipated to some extent that there would be negative reactions and there's a sense in which the article was a very deliberate provocation. That is, it is a deliberate defiance of a significant number of feminist forms—liberal, cultural and radical feminist forms across the board.

First, it violates the norm that men have dominated the world forever and now it's time for women's voices and women's points of view to be heard. The common idea among many feminists, in my experience, is that it's time for men to shut up: 'it's pretty annoying that you basically treated yourself as the voice of the universal for thousands of years and acted like what you feel and think is all that counts and fuck you'. So this responds to that by saying I'm not the voice of the universal. I have a totally gendered voice—an overtly gendered and white and middle class male voice. You get to argue your particularity and I'm going to argue my particularity too.

Second, it really emphasises from beginning to end the possibility of talking seriously about heterosexual arousal and pleasure. It recognises the omnipresence of abuse, but it's also about the joys of sex, a non-existent theme in feminist legal literature. That doesn't mean feminists would necessarily hate it, but I think it was fairly provocative and transgressive to talk about male sexual excitement. Again, this is deeply associated with abuse, but it takes that on directly. Just as it takes on the male voice by saying I'm not universal, I'm particular, it takes on this by saying I totally recognise that abuse is an important part of it but I'm going to talk about it anyway.

Does your shift in focus reflect an engagement with new literatures?

I was reading a lot of feminist legal theory and feminist theory at this point. I've been influenced by various forms of American legal realist literature and Continental critical literature—but not Continental legal literature—right from the beginning of my

⁴⁴JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

career. Some fashion changes in critical theory come along and my goal is to scarf them up and use them, just like my attitude towards Marxism. And changes in Marxism also occur. So I'm constantly, in my own mind, cannibalising and doing *bricolage* with what's available. This has led repeatedly to the charge that I am a 'theory whore'. And what's available at this point in my reading was not just feminist legal theory but even more interesting was the critical, somewhat PoMo-influenced, feminist theory. *Gender Trouble*⁴⁵ was a major influence—it was a very exciting moment when I read *Gender Trouble*—as was Jane Gallop—*The Daughter's Seduction* and *Thinking Through the Body*.⁴⁶ And then the radical feminists, reading Catharine MacKinnon and Andrea Dworkin—Dworkin had more influence on me by far than MacKinnon. So these are the people who I'm responding to and reacting in relation to.

In 1997, you published A Critique of Adjudication {fin de siècle},⁴⁷ a book that returns to the theme of adjudication while also drawing on these different traditions: American legal realism, Continental social theory. One of the central elements is the political nature of legal decision-making, the choice and agency of decision makers. But it is also a synthesis of a lot of your earlier work, and of CLS more broadly. Is that how you understood it in writing it?

Yes, I did. I wrote it because I thought there was accumulated a body of work, both my work and the work of other people, that would permit a kind of synthesis on the particular topic of adjudication. Adjudication, of course, had been a big preoccupation of both the legal realists and the American Crits, but also the American liberals.

What was the reaction to it?

I would say that there was amazingly little reaction to it. That is, as a publishing event—it was published by the Harvard University Press—it was a complete non-event. It sold a couple of thousand copies, overwhelmingly to libraries. It was reviewed in the *Harvard Law Review* in a student book note—a completely snotty put-down treating it as something any idiot could see was wrong on most fronts⁴⁸—and it wasn't reviewed in any other major law review in the US.

There's not a single review of the book by any sort of big-time law professor except for one review by Richard Posner in the *New Republic*. It's called 'Bad Faith' and it's a very strange review.⁴⁹ The *New Republic* had a long tradition of trashing Critical Legal Studies. Marty Peretz knew who we were and thought we were monsters.⁵⁰ My editor at Harvard University Press heard that Posner wrote the review and sent it in only to be told that it had to be made more negative. The title, 'Bad Faith', is totally an accusation

⁴⁵ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

⁴⁶ JANE GALLOP, *THE DAUGHTER'S SEDUCTION: FEMINISM AND PSYCHOANALYSIS* (1982); JANE GALLOP, *THINKING THROUGH THE BODY* (1988).

⁴⁷ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE}* (1997).

⁴⁸ *Duncan Kennedy's Stiff Knees*, 111 HARV. L. REV. 2117 (1998).

⁴⁹ Richard Posner, *Bad Faith*, NEW REPUBLIC, June 1997, at 34.

⁵⁰ Peretz bought the NEW REPUBLIC in 1974.

at me of being in bad faith, but there's nothing about bad faith at all in the review itself. So the review has the quality of being basically a pan, which nonetheless agrees with every important proposition in the book. Go figure.

Aside from that, nothing. No liberal law professor reviewed it. So how was it received? It was received by complete overwhelming silence, except that within the community of Critical Legal Studies there was an amazing event organised by Michael Fischl and Pierre Schlag. This was a symposium at the University of Miami,⁵¹ an astonishingly elaborate, serious response by some people to whom I was close and others to whom I wasn't. It was an intra-movement event, although by that time the movement had ceased to exist as a movement.

In the last decade you've returned to your earlier work on Classical Legal Thought, extending the analysis forward in time first with 'Two Globalizations of Law and Legal Thought' and then further with 'Three Globalizations of Law and Legal Thought'.⁵² Do you see this as a return to earlier interests?

Definitely, yes I do. But it combines all the earlier interests—really, all of them. For example, family law, sex and reproduction figure very significantly in the 'Three Globalizations' chapter. Sex, reproduction and family are almost never a major part of discussions of globalisation, except in the sense of advocacy, but here the idea was to apply the basic techniques and approaches of the earlier work to incorporate the sexual dimension into the big historical picture. So all the earlier interests are in there.

What was your motivation in bringing all these themes together into this broad mapping of the diffusion of legal thought from core to periphery?

You can identify motivations at two levels. One motive would be grandiosity. By this time I was thinking I was trying to make a contribution to critical social theory and very large, global, totalising schemes are a major part of that tradition. So this was me trying, for law, my version of the model of the grand narrative. It's totally not post-modern; its modernist, the model of what Weber called universal history, and unapologetically so.

The second motive was to contribute a theoretical dimension to the creation of a globalised critical theory at the moment of the triumph of neo-liberalism. It's written on the basis of the work of my students in the Harvard Law School doctoral program—it's loaded with footnotes to my students, even their unpublished doctoral work—and it's for them. In other words, it's written for them and it uses their work. They're trying to develop a legal academic theory-practice against neo-liberalism oriented to the Global South and it's my attempt to contribute to that common political project.

⁵¹ The symposium was published in 22 CARDOZO L. REV. (2001).

⁵² Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850-1968* 36 SUFFOLK U. L. REV. 631(2003); Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David Trubek & Alvaro Santos eds., 2006).

If 'Globalizations' is written for your doctoral students, it also provides the framework adopted by many for their own work. Do you see it as being very influential?

Well, it's very hard to know about that kind of thing. I don't follow carefully citation patterns. But people like you give me a sense that it's been quite influential and that's very satisfying. It seems like it had legs, unlike *Critique of Adjudication*, which doesn't provide the framework for pretty much anything. I think 'Globalizations' has actually had some mainstream impact among comparativists, mainly in Europe. American legal academia has very few comparativists and in general they work in a positivist social science frame that is at the opposite methodological pole from 'Globalizations'.

You lay out an incredibly dense description of three waves in the globalisation of legal thought, but there's little, or even no, explanatory framework for why these ideational changes are occurring.

That's what Morty Horwitz said about the *Rise and Fall of Classical Legal Thought*. And many other people have had similar reactions. All my historical work is immediately reacted to by people who are from what you might call the materialist tradition—not necessarily Marxists, but people who believe that there's some basic sense in which reality leads theory. If you want to understand what happens in thought, look at what happens on the ground. Then there's the more classic liberal criticism: my story isn't adequately liberal because the stages are completely devoid of inner moral content. There's no narrative of development or evolution that could be understood in any way as a progress narrative. So on the one hand there's no underlying structure and on the other it's a death of reason narrative.

My basic response to that is, it would be nice if there were a plausible totalisation of a story of material transformations with the story of thought. Be my guest. The ambition to do it that way, I think, is not bad. I myself understand the narrative as totally a narrative in which changes in consciousness are in relation to transformations in the base. Urbanisation and industrialisation are obviously what the Social is about. The Social is a reaction to those things. And, earlier, Classical Legal Thought is the framework of a particular moment in capitalist economic development. What's missing is a logic that integrates the material and the ideal in the mode of either Hegel or Marx.

You mentioned the importance of your doctoral students. When did your priorities shift from JD students to graduate students?

It's been a very long, gradual process. The height of student radicalism at Harvard Law School was between 1987 and 1991. That was equivalent in intensity to radicalism amongst college students between 1967 and 1971. The source now was radicalised identity politics. Black students, women students and gay students were increasing as a proportion of the student body all through the 80s, as were the number of law professors.

So in the 80s, radicalism is around identity politics and everything is issue activism. The liberal arts colleges produce Harvard law students, each of whom has had a cause to which they were devoted during their time at college. But they're very self-conscious

not ideological—definitely not Marxist. Violence against women is a major issue and there are feminists, but they're not identified with any left. Teaching students is still really fun and I revised my first year courses to give them a very elaborate identity and class oriented legal theory that was supposed to allow these students to see that the background-rules thesis totally applied to them.

It worked until the mid-90s when the number of first-year students who were into it got smaller and smaller. The strand of identity politics and special interest politics faded, replaced by 'public interest'—the public interest auction has become the central idea of progressivism at the law school, which would have been a joke to the progressive ethos of 1987. Critical Legal Studies was by now also totally stigmatised and Yale was taking a larger share of academically oriented students. The percentage of Harvard Law School students who didn't get into Yale Law School had gone up and up, partly because Critical Legal Studies had undermined the reputation of the Harvard Law School within the audience of law school deans who are crucial characters in the *US News & World Report* survey that determines the standing of academic institutions.

It is often said that we destroyed Harvard—that Yale's ascendancy was caused by what we did beginning in the late 1970s. The common view is that Yale Law School triumphed because it was not disrupted internally by the radicals, who they purged. I think this is largely correct. That is, I think the Yale Law School's current intellectual prestige is directly based on the reaction of the law professoriate to the disruption of Harvard Law School through the 1980s. And that is one of the reasons why the Harvard Law School faculty crushed the Crits. It was obvious that we were destroying the 'number one' status in the mid-80s and the alumni—the Wall Street lawyers—were completely conscious that part of their intellectual-professional capital was invested in the 'number one' status of Harvard Law School. It does not do them any good that they went to Harvard when it was number one if it is now number five—all that counts is the present. They very self-consciously reached the conclusion that the status of the school had been destroyed and that was a major basis for the attack on the Crits and the firing of Daniel Tarullo and Clare Dalton.

So by the mid-90s the radicals had disappeared, and the liberals had just been pummelled: they were scared, they were intimidated, they had lost their self-confidence. They were now a difficult audience for lines like mine. It used to be I would get very good reviews, three years out of four. It became more like two years out of three. So I began to want to get out and I spent several years negotiating myself out of teaching required first-year courses. The compromise was I would teach an optional first-year course every other year.

Meanwhile you took on more and more graduate students.

Yes, the LLM and SJDs were completely the opposite experience: more and more satisfying. David Kennedy took over the graduate programme at the start of the 1990s and he revolutionised it. There had been a massive LLM program, but it was basically just for Latin Americans who wanted to pass the New York bar. It was a cash cow for the school because students were charged full tuition and were all in very big classes—they took mainly business law classes. And they were also big financial contributors

because they formed Harvard graduate associations in Managua, Mexico City, Montevideo and so on, which were part of the elite structure of the local bar. David had the idea of turning it into a graduate school on the model of an academic graduate degree. The main thing was to create a viable SJD programme: the LLM would remain a cash cow, but a segment of the LLMs would be selected for their interest in law teaching and some of them would then be admitted to the SJD and eventually get jobs as law teachers and we could create a new generation of critical scholars. David allied with the Law and Economics people, who had a similar agenda, and they created this new project, which has been extremely successful.